Teh Eng Peng @ Teh Joo v Teh Swee Lian

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C–02–564 OF 1998
MOKHTAR SIDIN, ARIFIN ZAKARIA AND NIK HASHIM JJCA
14 JULY 2004

Contract — Illegality — Contravention of law — Unregistered agent for sale of land — Whether agreement for commission for sale of land by person not registered as estate agent was contrary to law and unenforceable — Valuers, Appraisers and Estate Agent Act 1981 ss 22B & 22C

Professions — Estate agent — Unregistered agent for sale of land — Whether 'practising or carrying on estate agency practice' — Whether existed estate agency relationship rendering contract for commission unenforceable — Valuers, Appraisers and Estate Agent Act 1981 ss 22B & 22C

The first appellant was a co-owner of several pieces of land. He together with the other co-owners requested the respondent to find a buyer for the lands. An agreement ('P1') was drawn up authorizing the respondent to sell the lands. Under the agreement, the sale price was stated as RM40,000 per acre and the respondent will be paid a commission of 2% from the total sale price. It was further provided that in the event the respondent was able to sell the lands above RM40,000 per acre then the additional value shall belong to the respondent. The respondent succeeded in obtaining a purchaser for the lands. This claim by the respondent was for commission and the additional sum due to him under the agreement.

The first appellant contended that the agreement P1 was illegal, null and void and consequently not enforceable in law because the respondent was not a registered real estate agent and not authorised under the Valuers, Appraisers and Estate Agent Act 1981 ('the Act') to undertake estate agency practice; thus, the agreement was not enforceable against the appellant. It was not in dispute that the respondent was not a registered estate agent under the Act.

The respondent argued that he was not practising or carrying on an estate agency practice. Further, the respondent never held himself out to the members of public that he was an estate agent or carrying out estate agency practice. Therefore, the respondent argued that what he did in the circumstances of this case fell outside the provisions of the Act. The High Court allowed the respondent's claim. The first appellant appealed.

Held, dismissing the appeal:

(1) From the long title, it was clear that the Act seeks to provide, inter alia, for the registration of estate agents and for matters connected therewith.(see para 10). The question whether the respondent could be considered to have carried out 'estate agency practice' may be answered by looking at the surrounding circumstances relating to the sale transaction of the lands itself and any similar transaction that the respondent may have been involved (see para 11).

(2) In the present case as emphasized by the learned judge, there was not in existence a system or a course of conducts which went to show that the respondent was practising or carrying on business as estate agent. The transaction in question was just an isolated transaction. Further, no 'estate agency relationship' existed between the respondent and the land owners including the first appellant. What happened was that the land owners requested the respondent to look for potential buyer of the lands and if successful the respondent will be paid a commission. There was nothing to show that the respondent had offered any professional advice or other services to the first appellant as an estate agent. Also the respondent was a close relation of the first appellant as his father was one of the co-owners of the lands. All these facts conjointly negatived the existence of 'estate agency relationship' between the parties (see para 13).

(3) Similarly, the respondent could not be said to be carrying on the practice of estate agency based on the single transaction, in the absence of some evidence of a system or continuity in his conduct or activity (see para 14). In the circumstances, as concluded by the learned judge what had taken place was not caught by ss 22B and 22C of the Act and, therefore, the agreement was valid and enforceable in law (see para 11).

[Bahasa Malaysia summary

Perayu pertama adalah pemilik bersama beberapa bidang tanah. Beliau bersama pemilik bersama lain memohon responden mencari pembeli untuk tanah-tanah berikut. Satu perjanjian ('P1) telah dibuat memberi kuasa kepada responden untuk menjual tanah-tanah tersebut. Di bawah perjanjian itu, harga jualan dinyatakan sebagai RM40,000 seekar dan responden akan dibayar komisyen 2% daripada keseluruhan harga jualan. Ia diperuntukkan selanjutnya bahawa sekiranya responden dapat menjual tanah tersebut di atas RM40,000 seekar maka nilai lebih tersebut adalah milik responden. Responden telah berjaya mendapat pembeli untuk tanah tersebut. Tuntutan oleh responden adalah untuk komisyen dan jumlah lain yang perlu dibayar kepada beliau di bawah perjanjian tersebut.

Perayu pertama berhujah bahawa perjanjian P1 menyalahi undang-undang, terbatal dan tidak sah dan berikutan itu tidak berkuat kuasa dari segi undang-undang kerana responden ejen hartanah yang tidak berdaftar dan tidak diberi kuasa di bawah Akta Penilai, Pentaksir dan Ejen-Ejen Harta-Tanah 1981 ('Akta tersebut') untuk mengendalikan amalan agensi hartanah; oleh itu, perjanjian itu tidak berkuat kuasa terhadap perayu. Ia tidak dipertikaikan bahawa responden ejen hartanah tidak berdaftar di bawah Akta tersebut.

Responden berhujah bahawa beliau tidak mengamalkan atau menjalankan amalan agensi hartanah. Tambahan pula, responden tidak memperkenalkan dirinya kepada orang awam bahawa beliau seorang ejen hartanah atau menjalankan amalan agensi hartanah. Oleh itu, responden berhujah bahawa apa yang beliau lakukan dalam keadaan kes ini di luar peruntukan Akta tersebut. Mahkamah Tinggi membenarkan tuntutan responden. Perayu pertama merayu.]

Diputuskan, menolak rayuan tersebut:

(1) Untuk tajuk panjang, adalah jelas bahawa Akta tersebut memperuntukkan, antara lain, untuk pendaftaran ejen-ejen hartanah dan untuk perkara yang berkaitan dengannya (lihat perenggan 10). Persoalan sama ada responden dianggap telah menjalankan 'estate agency practice' boleh dijawab dengan melihat keadaan sekeliling berkaitan dengan transaksi jualan tanah-tersebut itu sendiri dan transaksi sama yang lain yang mana responden terlibat (lihat perenggan 11).

(2) Dalam kes semasa seperti yang ditekankan oleh hakim bijaksana, tidak wujud sistem atau siri perlakuan untuk menunjukkan bahawa responden mengamalkan atau menjalankan perniagaan sebagai ejen hartanah. Transaksi yang dipersoalkan hanya satu transaksi terpencil. Tambahan pula, tiada 'estate agency relationship' wujud antara responden dan pemilik tanah termasuk perayu pertama. Apa yang berlaku adalah pemilik tanah telah memohon kepada responden untuk mencari pembeli tanah berpotensi dan jika berjaya responden akan dibayar komisyen. Tidak ada apa-apa yang menunjukkan bahawa responden telah menawarkan apa-apa nasihat profesional atau perkhidmatan lain kepada perayu pertama sebagai ejen hartanah. Juga responden mempunyai hubungan rapat dengan perayu pertama yg mana bapa beliau merupakan salah seorang daripada pemilik bersama tanah tersebut. Kesemua fakta berikut menidakkan kewujudan 'estate agency relationship' antara pihak-pihak (lihat perenggan 13).

(3) Begitu juga, responden tidak boleh dikatakan menjalankan amalan agensi hartanah berdasarkan satu transaksi semata-mata (lihat perenggan 14). Dalam keadaan sedemikian, seperti yang disimpulkan oleh hakim bijaksana apa yang berlaku tidak terangkum dalam ss 22B dan 22C Akta tersebut dan, oleh itu, perjanjian tersebut adalah sah dan berkuat kuasa dari segi undang-undang (lihat perenggan 11).

Notes

For cases on contravention of law, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3620–3635.

For cases on estate agents generally, see 10 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1493–1577.

Cases referred to

Hindustan Steel Ltd v The State of Orissa AIR [1970] SC 253 (refd)

Luxor (Eastbourne) Ltd v Cooper [1941] AC 108 (refd)

Matad Sdn Bhd v Ng Chee Keong [2004] 2 CLJ 99 (refd)

SRK Trading Sdn Bhd v City One Sdn Bhd & Anor [1993] 4 CLJ 617 (refd)

Smith v Anderson (1880) 15 Ch D 247 (refd)

Legislation referred to

Contracts Act 1950 s 11

Valuers, Appraisers And Estate Agent Act 1981 ss 22B, 22C

Appeal from: Suits No 22–9 of 1996 and No 22–12 of 1996 (High Court, Temerloh)

Robert Lazar (Shearn Delamore & Co) for the appellant.
Mogan Mariappan (Ho Mogan & Nor'aini) for the respondent.

Arifin Zakaria JCA (delivering judgment of the court):

BACKGROUND

[1] This is an appeal against the decision of the learned High Court judge in allowing in part the respondent/plaintiffs claim against the first and second appellants. The second appellant had since passed away and his estate had discontinued the appeal, therefore, we are only left with the appeal of the first appellant. We dismissed the appeal and we now give our reasons.

FACTS

[2] The first appellant and his two brothers, Teh Seng @ Teh Eng Woon (second appellant) and Teh Eng Choo were co-owners of four pieces of land namely:

(i) CT No 1760: Lot 1128;

(ii) Grant No 3536: Lot 1149;

(iii) Grant No 3538: Lot 1148; and

(iv) Grant No 3539: Lot 1124

all in Mukim Sabai, Daerah Bentong, Pahang ('the said lands'). The respondent is the son of Teh Eng Choo and is, therefore, the nephew of the first and second appellants. The first appellant had 5/8 shares over the said lands, while the second appellant and Teh Eng Choo had 1/8 and 2/8 shares respectively.

[3] They decided to dispose of the said lands. Sometime in January 1995 they called the respondent to the first appellant's shop and requested the respondent to find buyer for the said lands. An agreement was then drawn up authorizing the respondent to sell the said lands. This agreement is produced as exh P1 ('the agreement'). Under the agreement, the sale price is stated as RM40,000 per acre and the respondent will be paid a commission of 2% from the total sale price. It is further provided that in the event the respondent is able to sell the said lands above RM40,000 per acre then the additional value shall belong to the respondent.

[4] The respondent then passed the word round of the offer for sale of the said lands. Through his brother-in-law and someone named Leong, the respondent succeeded in obtaining a purchaser for the first three pieces of the said lands. This appeal is only concerned with the sale of these three pieces of the said lands.

They were sold for a total sum of RM7,614,475 and the said sum was paid to the owners according to their respective shares. This claim by the respondent is for commission and the additional sum due to him under the agreement.

ISSUES AND FINDINGS

[5] Both before us and in the court below the first appellant contended that the agreement P1 was illegal, null and void and consequently not enforceable in law. Reliance was placed on ss 22B and 22C of the Valuers, Appraisers And Estate Agent Act 1981 ('the Act') and s 11 of the Contracts Act 1950. The first appellant's contention was that as the respondent was not a registered real estate agent and not authorised under the Act to undertake estate agency practice, therefore, the actions and steps taken by the respondent in the sale of the said lands was contrary to law. It follows, therefore, that the agreement is not enforceable against the appellant.

[6] The relevant provisions of ss 22B and 22C of the Act state:

> 22B Estate agency practice
>
> (1) Subject to the provisions of this Act, a registered estate agent who has been issued with an authority to practise by the Board shall be entitled to practise his profession and shall be authorised to undertake estate agency practice.
>
> 22C (1) No person shall unless he is a registered estate agent and has been issued with an authority to practise under section 16 —
>
> (a) practise or carry on business or take up employment under any name, style or title containing the words 'Estate Agent'. 'House Agent', 'Property Agent'. 'Land Agent', 'House Broker' or the equivalent thereto, in any language or bearing any other word whatsoever in any language which may reasonably be construed to imply that he is a registered estate agent.
>
> (aa) carry on business or take up employment as an estate agent;
>
> (b) …
>
> (c) undertake any of the work specified in section 22B; or
>
> (d) be entitled to recover in any court any fees, charges or remuneration for any professional advice or services rendered as an estate agent.

[7] It is not in dispute that the respondent in the present case was not a registered estate agent under the Act, therefore, the first appellant contended the respondent is not allowed under s 22C(1)(c) from undertaking any work specified in s 22B. And by s 22C(1)(d) he is precluded from claiming against the first appellant for any fees, charges or remuneration. On that premise, the first appellant contended, the claim by the repondent must fail

[8] In reply, the learned counsel for the respondent argued that the respondent in this case is not practising or carrying on an estate agency practice. What he did was to look for buyer for the said lands at the request of the owners. Further he contended the respondent never held himself out to the members of public that he is an estate agent or carrying out estate agency practice. Therefore, he said, what the respondent did in the circumstances of this case falls outside the provisions of the Act.

[9] The learned judge agreed with the respondent's submission. In his grounds of judgment which was in Bahasa Malaysia, he summarised the issues and his findings thereon are as follows:

> Satu-satunya persoalan yang timbul dan perlu diputuskan oleh mahkamah ini ialah sama ada P1 adalah merupakan satu kontrak yang menyalahi undang-undang yang menyebabkan ianya tidak boleh berkuatkuasa.
>
> Di dalam mencari jawapan kepada persoalan ini perlulah juga diputuskan sama ada defendan di dalam tindakannya mendapatkan pembeli bagi tanah-tanah tersebut telah bertindak sebagai 'estate agent'.
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> Akta 1981 tidak ada membuat pengtakrifan bagi ungkapan 'estate agent'. Walau bagaimanapun *The Concise Oxford Dictionary* (9th Ed) memberi erti 'estate agent' sebagai 'a person whose business is the sale or lease of buildings and land on behalf of others'. Sementara perkataan 'business' pula diberi erti sebagai 'one's regular occupation, profession or trade.'
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> Di bawah s 22B seseorang hanya boleh menjalankan 'estate agency practice' setelah ia mendaftar sebagai 'estate agent' dan diberi kebenaran untuk beramal sedemikian. Ungkapan 'estate agency practice' telah ditakrifkan di bawah s 2 sebagai 'acting or holding oneself out to the public as ready to act, for reward, as an agent in respect of the sale or other disposal of lands and buildings…'. Dari ungkapan di atas, perkataan yang operatif dan perlu diberi penekanan ialah 'practice'. *The Concise Oxford Dictionary* telah memberi erti 'practice' di antara lain ialah 'habitual action or performance, repeated exercise in an activity requiring the development of skill.
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> *Kamus Dewan Inggeris/Melayu, Dewan Bahasa dan Pustaka* (Edisi Pertama) memberi makna 'practice' di antara lain sebagai 'habitual action, kebiasaan, amalan, business establishment'.
>
> Berpandukan kepada erti dan maksud yang diberikan seperti yang dinyatakan di atas maka amatlah jelas bahawa seseorang itu akan hanya boleh dianggap dan dikira sebagai melakukan dan menjalankan 'estate agency practice' sekiranya ia menjalankan amalan dan perniagaan seperti yang dilakukan oleh seseorang estate agent.

[10] We are in full agreement with the reasoning and the conclusion arrived at by the learned judge. From the long title it is clear that the Act seeks to provide, inter alia, for the registration of estate agents and for matters connected therewith. By s 2 of the Act 'estate agency practice' is defined as follows:

> 'estate agency practice' means acting or holding oneself out to the public as ready to act, for a commission, fee, reward or other consideration, as an agent in respect of the sale or other disposal of land and buildings and of any interest therein or the purchase or other acquisition of land and buildings and of any interest therein or in respect of the leasing or letting of land and buildings and of any interest therein;.

[11] Taking into consideration the definition as set out above, could the respondent in the present case be considered to have carried out 'estate agency practice'. This is a question that may be answered by looking at the surrounding circumstances relating to the sale transaction of the said lands itself and any similar transaction that the respondent may have been involved. The learned judge had correctly addressed his mind to this issue. He took into consideration the close relationship between the respondent and the owners, who are his father and uncles.

A He also found that there was no evidence to show that the respondent had held himself out as carrying on estate agency practice or had carried out similar transaction on previous occasion. He described the transaction in question as an isolated transaction. In the circumstances, the learned judge concluded that what had taken place here is not caught by ss 22B and 22C of the Act and, therefore, the agreement B is valid and enforceable in law.

[12] His decision found support in the decision of this court in *Matad Sdn Bhd v Ng Chee Keong* [2004] 2 CLJ 99. In that case, the defendant, who was interested in buying some land, promised to pay the plaintiff 1% for introducing the land. C The plaintiff introduced the defendant to a vendor with land for sale. The defendant bought the land but refused to pay the plaintiff his commission. The plaintiff commenced action to recover the commission as promised. The defendant took two main defences, namely: (i) that it was not the plaintiff who introduced the land; and (ii) that the contract which the plaintiff sought to enforce was illegal and void in that it contravenes the Act. The High Court found for the plaintiff on both issues. D What concerned us is the second defence raised in that case, that is, the legal defence. The appeal by the defendant in that case was dismissed by the Court of Appeal. After a thorough analysis of the relevant provisions of the Act, Gopal Sri Ram JCA, in delivering judgment of the court, observed as follows:

E > What we need to say for the present is that the word 'acting' in the definition clause must be read contextually, that is to say, in the context of s 22C. That section contemplates someone who 'practises as' or who may 'carry on business' as 'an estate agent' (see s 22C(1a) and (aa)). Special notice should also be taken of the use of the word 'practise' in the opening words of s 22C(1).

F > Two points need to be made immediately. First, the section uses language that requires some system. Words such as 'practice', 'carry on business' point to a course of conduct: not to an isolated act. It is not unlike the Moneylenders Act cases. There too, a course of conduct or system is called for: see *Yeep Mooi v Chu Chin Chua & Ors* [1981] 1 MLJ 14, *Shamsudin v Vijeyacone* [1971] 1 MLJ 7. It follows that the High Court did not fall into error by seeking assistance from those cases. Secondly, the section uses the term 'estate agent'. It is G > thus clear that the Act requires an estate agency relationship to exist between parties. In the absence of such a relationship the Act has no application. Whether such a relationship exists in a given case is a question of fact depending upon the facts and circumstances of each case.

[13] In the present case as emphasized by the learned judge, there was not in H existence a system or a course of conducts which go to show that the respondent was practising or carrying on business as estate agent. The transaction in question was just an isolated transaction. Further, we found that there was no 'estate agency relationship' existed between the respondent and the land owners including the first appellant. What happened was that the land owners requested the respondent to look I for potential buyer of the said lands and if successful the respondent will be paid a commission. There was nothing to show that the respondent had offered any professional advice or other services to the first appellant as an estate agent. Further, the respondent here was a close relation of the first appellant and as stated earlier his father was one of the co-owners of the said lands. In our judgment, all these facts conjointly negative the existence of 'estate agency relationship' between the parties.

[14] Further, it is to be noted that the decision of the High Court in the present case was considered by of this court in *Matad Sdn Bhd* and it had met with the approval of the court. The court expressed the view that the learned judge had correctly held on the facts before him, that an isolated transaction did not constitute a holding out by the plaintiff and that evidence of system was necessary to prove estate agency practice. The court, however, went on to say that what appears to be an isolated act may amount to estate agency practice if evidence of a system of such acts is established to the satisfaction of the court. We entirely agree with that proposition. Further as rightly observed by Anuar J (as he then was) in *SRK Trading Sdn Bhd v City One Sdn Bhd & Anor* [1993] 4 CLJ 617, 'The word 'practice' which appears in the Act, in my judgment, requires some continuous activity (see *Smith v Anderson* (1880) 15 Ch D 247; *Hindustan Steel Ltd v The State of Orissa* AIR [1970] SC 253 and *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108).' Similarly here, we are of the opinion that, the respondent could not be said to be carrying on the practice of estate agency based on the single transaction, in the absence of some evidence of a system or continuity in his conduct or activity.

DECISION

[15] For the above reasons, we dismissed the appeal herein with costs and directed that the deposit be paid to the respondent towards account of taxed costs.

Appeal dismissed.

Reported by Loo Lai Mee